Calendar No. 243

100TH CONGRESS
1st Session

SENATE

REPORT
100-115

AMENDING THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

JULY 17 (legislative day, JUNE 23), 1987.—Ordered to be printed

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Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 432]

together with

ADDITIONAL VIEWS

The Committee on the Judiciary, to which was referred the bill (S. 432) to amend the Hart-Scott-Rodino Antitrust Improvements Act of 1976, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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I. PURPOSE

The purpose of S. 432 is to improve the review of proposed mergers under the Hart-Scott-Rodino Antitrust Improvements Act of

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1976 (Hart-Scott-Rodino). Section 7A of Hart-Scott-Rodino established a premerger notification system. Under that system, proposed mergers valued over specified monetary threshold amounts must be reported to the U.S. Department of Justice and the Federal Trade Commission before their consummation. The Federal antitrust enforcement agencies then have an opportunity to determine whether the proposed transaction may violate the antitrust laws. If it appears that the proposed transaction may constitute such a violation, the agencies may apply to the court to enjoin the merger before it is completed.

In formulating the Hart-Scott-Rodino premerger reporting system, Congress recognized that preconsummation enforcement action is the most effective way to prevent the harmful effects of anticompetitive mergers. If enforcement action were possible only after the merger were completed, the only remedy available to the Justice Department and the Federal Trade Commission would be to try to separate the assets of two firms that have already combined. That task is often difficult, if not impossible, and rarely restores competition to its original state. Therefore, Congress concluded that effective premerger review and enforcement were appropriate.

If the Hart-Scott-Rodino premerger reporting system is to function efficiently, the antitrust agencies must have enough time to conduct a thorough review of the proposed merger. The Committee has concluded that more time should be provided for premerger review in certain situations. In addition, the Committee believes that the monetary thresholds for reporting enacted in 1976 should be updated. This would eliminate the burden on small businesses to report transactions unlikely to raise any possibility of significant competitive harm and relieve the Government from reviewing such transactions.

S. 432, as amended by the substitute offered by Senators Metzenbaum and Thurmond, accomplishes these necessary changes.

II. Legislative History

S. 432 was introduced on February 2, 1987, by Senator Metzenbaum and was referred to the Committee on the Judiciary, Subcommittee on Antitrust, Monopolies, and Business Rights. A hearing on the bill was held on February 26, 1987. An amendment in the nature of a substitute offered by Senator Metzenbaum was unanimously polled out of the subcommittee on April 29, 1987. An amendment in the nature of a substitute was offered by Senators Metzenbaum and Thurmond and considered by the Committee on the Judiciary on May 19, 1987. Senator Specter offered the following amendment to the substitute which was defeated by a vote of 9 opposed and 3 in favor.

> At the end of the bill, insert the following new section:
> SEC. . Subsection (h) of section 7A of the Clayton Act (15 U.S.C. 18a(h)) is amended—
> (1) by inserting "(1)" after "(h)"; and
> (2) by adding at the end the following new paragraph:
> "(2)(A) Nothing in this section is intended to prevent the discretionary disclosure of information or documentary

material to State Attorneys General solely for the purpose of investigating or enforcing a claim that the acquisition subject to the filing requirements of this section violates section 7A of the Clayton Act (15 U.S.C. 18a) or sections 1 or 2 of the Sherman Act (15 U.S.C. 1 and 2) or any similar provisions of State antitrust law. Any disclosure of information or documentary material to a State Attorney General under this section shall be subject to prior certification by the State Attorney General that such information or documentary material will be maintained in confidence in conformity with this section and used only for the purpose specified in this section.

"(B) For purposes of section 1905 of title 18, United States Code, a State Attorney General—

"(i) shall be considered to be an agent of the Department of Justice; and

"(ii) shall be subject to the provisions of such section with respect to the disclosure of information under this section.".

S. 432, as amended, was approved by the Committee on the Judiciary by voice vote on May 19, 1987.

III. Discussion

Section 7A of the Clayton Act requires transactions to be reported to the antitrust enforcement agencies if:

1. Either the acquiring party or the acquired party is engaged in commerce or an activity affecting commerce;

2. Either party has annual net sales or total assets of $100 million or more, and the other party has $10 million or more in annual net sales or total assets; and

3. The acquiring party would hold 15 percent or more of the voting securities or assets of the acquired party, or more than 15 million dollars' worth of its voting securities and assets after the acquisition.

Under the regulations, a party determines whether it meets the monetary threshold values by adding its sales or assets to (1) the assets or sales of the entity which controls it and (2) the assets of any entity controlled by the entity which controls it.

A. THE MONETARY THRESHOLDS

The monetary threshold amounts in current law were enacted over 10 years ago. Due to inflation, smaller transactions than Congress originally envisioned must be reported to the Federal enforcement agencies. Thus, the Federal enforcement agencies are burdened with reviewing transactions that are not likely to raise antitrust concerns, and small businesses and other persons are obligated to file unnecessary reports.

S. 432 increases two of these monetary thresholds. First, it increases the "size of person threshold" for the smaller party from $10 million to $15 million. Second, it increases the size of transaction threshold from $15 million to $20 million.

Thus, as amended, section 7A of the Clayton Act requires that a proposed merger be reported to the Federal antitrust enforcement

agencies if either party is engaged in commerce or in an activity affecting commerce; either party has annual net sales or total assets of $100 million or more and the other party has $15 million or more in annual net sales or total assets; and the acquiring party would hold 15 percent or more of the voting securities of the acquired party, or more than 20 million dollars' worth of its voting securities and assets after the acquisition.

B. THE LENGTH OF THE WAITING PERIODS

After submitting the necessary premerger information to the enforcement agencies, section 7A currently requires that the parties wait 30 days, or 15 days in the case of a cash tender offer, before consummating the merger. If the enforcement agencies determine that the merger would not violate the antitrust laws, they may advise the parties at any time after the premerger filing is made that the transaction may be completed. If, however, the enforcement agencies need more information about the transaction before they can assess its competitive implications, they may request such information from the merging parties. The enforcement agencies must make any request for additional information within the initial waiting period. As soon as all the requested information is submitted to the enforcement agencies, the parties must wait an additional 20 days, or 10 days in the case of a cash tender offer, before consummating the merger. The parties are free to complete the transaction after the expiration of this second waiting period unless the enforcement agencies have sued to enjoin the merger's consummation.

At the time that Hart-Scott-Rodino legislation was originally considered, some legislators were concerned that the premerger waiting period could, if unduly long, inappropriately discourage cash tender offers. Cash tender offers can be a procompetitive influence by encouraging incumbent management to be responsible to shareholder interests. This Committee agrees that cash tender offers may enhance competition and management efficiency and should not be unduly constrained. At the same time, however, the antitrust enforcement agencies must be afforded adequate time to review the effects of a proposed cash tender offer on competition.

The securities laws regarding cash tender offers have changed substantially, however, between 1976 and the present. At the time Hart-Scott-Rodino was enacted, the Williams Act required that a cash tender offer remain open for 10 days, or 7 days if the offer was for "any and all shares." In that context, section 7A, as originally enacted, provided a waiting period for cash tender offers that was more than two times as long as the Williams Act's minimum offering period—an initial period of 15 days plus a discretionary 10-day extension. Today, the Williams Act requires that cash tender offers remain open for 20 business days, roughly 26 to 28 calendar days. The 15 day/10 day antitrust waiting periods under section 7A, however, have never been updated.

The structure of a proposed merger, as a cash tender offer or otherwise, has nothing to do with its probable effect on competition. Nevertheless, the Federal antitrust enforcement agencies may only have a maximum time of 25 days to analyze a complex cash tender

offer. The merger of Socal and Gulf, for example, was valued at $13.3 billion and was structured as a cash tender offer. The Federal Trade Commission received about 1,200 boxes of documents, or about 1 million pieces of paper, in response to its request for more information. Under section 7A, the FTC staff had only 10 days to review these documents, determine whether or not the merger violated the antitrust laws, prepare a case to enjoin completion of the merger, and give the Commissioners enough time to review its recommendation. These tasks are far too important and complex to complete in only 10 calendar days.

S. 432 extends the 25-day waiting period (15 days plus 10 days) for cash tender offers to 40 days (20 days plus 20 days). These extensions of the waiting periods are designed to give the enforcement agencies more time to review proposed mergers but to avoid undue interference with cash tender offers.[1]

S. 432 also provides additional time for the review of complex mergers or mergers requiring the analysis of extensive amounts of information or documentary material, no matter how the deal may be structured. Should the Department of Justice or the Federal Trade Commission "reasonably require" additional time to analyze such a merger, the court shall provide the enforcement agencies with a third waiting period of up to 25 days. The provision does not allow the court to provide an automatic extension of time to the enforcement agencies. On the other hand, the agencies need not show a likelihood that the merger would violate the antitrust laws—a showing which would be required to enjoin the acquisition. Instead, the court must determine that the request for more time is a reasonable prerequisite for a thorough and complete antitrust analysis. The court could, for example, grant an extension of time based on the scope of the proposed merger, the number, size, or complexity of markets involved in the proposed transaction, the number of documents the agency needs to review in its analysis, the complexity of the antitrust analysis, or the extent of the agency's investigation into the competitive effects of the proposed transaction.

The Committee responds to the additional concurring views submitted by Senator Hatch concerning when the enforcement agencies "reasonably require" more time to review a merger. The Committee does not intend that the court balance the need for thorough antitrust review against the likelihood of success of the proposed merger, or private equities. The additional 25-day waiting period is intended to ensure that the enforcement agencies have enough time to conduct a complete analysis of the antitrust issues raised by the proposed transaction. The Committee intends this phrase to mean that the enforcement agencies must demonstrate

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[1] It is notable, however, that the directorate of economic policy and analysis of the Securities and Exchange Commission reports that there were 197 tender offers in 1986, 136 of which were treated as friendly by the target management, 51 of which were treated as hostile by the target management, and 10 of which were treated as neither friendly nor hostile. In addition, the Department of Justice and the Federal Trade Commission sought additional information about proposed mergers only 4.1 percent of the time in fiscal year 1986. The extension of time to review cash tender offers would have applied to only about two hostile takeovers in 1986 and can be expected to effect only about a handful of hostile takeovers annually after enactment.

that additional time is required for a thorough antitrust review, not simply that they desire additional time.

IV. Text of Bill as Reported

SEC. 1. Section 7A(a) of the Clayton Act is amended—

(1) in paragraph (2), by striking out "$10,000,000" each place it appears in subparagraphs (A), (B), and (C) and inserting in lieu thereof "$15,000,000"; and

(2) in paragraph (3)(B), by striking out "$15,000,000" and inserting in lieu thereof "$20,000,000".

SEC. 2. (a) Section 7A(b)(1)(B) of the Clayton Act is amended—

(1) by substituting "twentieth" for "fifteenth"; and

(2) by striking out "or (g)(2)" and inserting in lieu thereof the following ", (g)(2), or (g)(3)".

(b) Section 7A(e) of the Clayton Act is amended—

(1) by substituting "20-day" for "15-day" each place it appears;

(2) in paragraph (2) by striking out "(or in the case of a cash tender offer, 10 days)"; and

(3) by striking out the word "only" from the last sentence of paragraph (2) and inserting at the end thereof the following: "or (g)(3)".

(c) Section 7A(g) of the Clayton Act is amended by adding the following at the end thereof: "(3) The court may extend the additional period for up to 25 days if, due to the complexity or scope of the information or documentary material to be evaluated, the Federal Trade Commission or the Assistant Attorney General reasonably requires such additional time to determine whether the proposed acquisition may, if consummated, violate the antitrust laws."

SEC. 3. This Act and the amendments made by this Act shall become effective one hundred twenty days after the date of enactment of this Act.

V. Section-by-Section Analysis

Section 1. Section 1 reduces the number of filings the Government would receive involving small mergers. Under section 1, parties must notify the Government of their proposed merger if the smaller party's annual net sales or total assets were $15 million, raised from $10 million, and if the value of the entire transaction were $20 million, raised from $15 million. The value of the annual net sales or total assets of the larger party is kept at $100 million.

Section 2. Section 2 lengthens the waiting period for mergers structured as cash tender offers. Currently, the parties in a cash tender offer must initially wait 15 days before completion and, if the Government requests more information about the transaction, an additional 10 days. Section 2 increases both these periods to 20 days.

Section 2 also amends section 7A to allow a court to grant a third waiting period for larger or more complex mergers. The new provision allows the Federal antitrust enforcement agencies to seek up to 25 more days to analyze a merger if either agency reasonably requires the additional time due to the complexity or scope of the information or documentary material to be evaluated.

Section 3. Section 3 provides that the Act becomes effective 120 days after enactment. Thus, the Act applies to all proposed mergers to be consummated 120 days after enactment.

VI. Estimated Cost of Legislation

In accordance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, May 26, 1987.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 432, a bill to amend the Clayton Act regarding mergers, as ordered reported by the Senate Committee on the Judiciary, May 19, 1987.

Based on information provided by the Department of Justice, we estimate that enacting S. 432 would result in no additional costs to the Federal Government. The bill would increase the filing threshold for pre-merger notification and lengthen the period for antitrust review of mergers.

Enacting this bill would not affect the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

Edward M. Gramlich, *Acting Director.*

VII. Regulatory Impact Statement

Pursuant to paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that the Act will not have any direct regulatory impact.

VIII. Vote of the Committee

On May 19, 1987, with a quorum present, by voice vote, the Committee on the Judiciary ordered the amendment in the nature of a substitute to S. 432 favorably reported.

IX. Changes in Existing Law

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 432, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * *

TITLE 15—COMMERCE AND TRADE

* * * * * * *

§ 18a. Premerger notification and waiting period

(a) FILING.—Except as exempted pursuant to subsection (c), no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired, if—

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;

(2)(A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of [$10,000,000] *$15,000,000* or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more;

(B) any voting securities or assets of a person not engaged in manufacturing which has total assets of [$10,000,000] *$15,000,000* or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more; or

(C) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 or more are being acquired by any person with total assets or annual net sales of [$10,000,000] *$15,000,000* or more; and

(3) as a result of such acquisition, the acquiring person would hold—

(A) 15 per centum or more of the voting securities or assets of the acquired person, or

(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of [$15,000,000.] *$20,000,000.*

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d).

(b) WAITING PERIOD; PUBLICATION; VOTING SECURITIES.—(1) The waiting period required under subsection (a) shall—

* * * * * * *

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the [fifteenth] *twentieth* day), or on such later date as may be set under subsection (e)(2) [or (g)(2).], *(g)(2), or (g)(3).*

* * * * * * *

(e) ADDITIONAL INFORMATION; WAITING PERIOD EXTENSIONS.—(1) The Federal Trade Commission or the Assistant Attorney General

may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the [15-day] *20-day* waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.

(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the [15-day] *20-day* waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 20 days [(or in the case of a cash tender offer, 10 days)] after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person, (A) all the information and documentary material required to be submitted pursuant to such a request, or (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended [only] by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2) *or (g)(3)*.

* * * * * * *

(g) CIVIL, PENALTY; COMPLIANCE; POWER OF COURT.—(1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

* * * * * * *

(3) The court may extend the additional period for up to 25 days if, due to the complexity or scope of the information or documentary material to be evaluated, the Federal Trade Commission or the Assistant Attorney General reasonably requires such additional time to determine whether the proposed acquisition may, if consummated, violate the antitrust laws.

* * * * * * * *

X. ADDITIONAL VIEWS OF MESSRS. BIDEN AND SPECTER

Although we support the provisions of S. 432 as reported by the Committee, we believe that one important provision, allowing State attorneys general access to pre-merger filings, has been omitted. In our view, that provision is necessary to insure full and effective enforcement of the antitrust laws relating to mergers.

As originally introduced, S. 432 contained a provision that would have restored the discretion of the Federal Trade Commission and Department of Justice to share material filed by companies pursuant to Hart-Scott-Rodino with State officials who undertook to maintain the material in confidence and use it only for law enforcement purposes. Prior to 1984, Hart-Scott-Rodino had been interpreted to allow such information-sharing to facilitate the role of state officials in antitrust enforcement—a role which historically has been recognized by statute. The Federal Trade Commission, however, reversed that longstanding policy, as well as the practice of Federal and State cooperation in this area, and ruled that it was barred from sharing information with these State officials.

During the hearings on this measure conducted by the Committee's Subcommittee on Antitrust, Monopolies and Business Rights, we heard from the National Association of Attorneys General about the important role that State attorneys general play in enforcing the antitrust laws in general, and the provisions against anti-competitive mergers, in particular. In many instances, State officials are best situated to know of the anti-competitive impact of a proposed merger in a particular market and to press for the relief necessary to avoid that impact. Unfortunately, the FTC's recent ruling that Hart-Scott-Rodino filings could not be shared makes participation by State officials needlessly difficult and costly.

Testimony was also presented at the hearing from those who were concerned about the consequences of restoring information sharing. None of those testifying presented any example of abuse by State attorneys general when Hart-Scott-Rodino material was provided to them. In order to address the concerns that were raised, however, amendments to this provision were proposed that woud have (1) limited the availability of pre-merger filings to State attorneys general rather than to all State law enforcement officials; (2) required that the information be used solely for enforcement of Federal and analogous State antitrust laws; and (3) subjected State attorneys general and their employees to the criminal sanctions for unauthorized disclosure of Hart-Scott-Rodino materials currently applicable to FTC and Justice Department employees.

It is this limited and narrowly tailored provision that we believe should have been included in S. 432 as reported by the Committee. In our judgment, such a provision would foster Federal and State cooperation and be an invaluable aid to enforcement of the antitrust laws.

XI. ADDITIONAL VIEWS OF MR. HATCH

Cash tender offers perform a vital economic function. By reallocating resources to more efficient uses and by replacing inefficient management, takeovers can enable American businesses to compete more effectively in both domestic and international markets. Unnecessary delays in the takeover process, consequently, can have the unintended effect of inhibiting competition. Delays give the target firm time to defeat the offer or to employ tactics to discourage investors from taking the risks involved in a cash tender offer. Accordingly, any legislation extending waiting periods for sensitive cash tender offers must carefully balance the benefits of expeditious takeovers against the need for time to analyze transactions for anticompetitive effects.

The provision of this bill permitting courts to extend the additional period for cash tender offers in complex cases should be read in this context. In order to realize the economic benefits of cash tender offers, waiting periods must be held to the absolute minimum necessary to evaluate information or documentary material relevant to possible anticompetitive effects of the transaction.

An early version of the Metzenbaum substitute amendment would have granted the additional 25-day extension upon the request of the Federal Trade Commission or the Assistant Attorney General. This could have allowed automatic extensions of time without any showing of the necessity of additional time to ascertain prospective anticompetitive effects or to review extraordinarily voluminous documentary submissions. For this reason, I intervened in the negotiation process which produced the Metzenbaum substitute. Further negotiations modified the Metzenbaum substitute to require the enforcement agencies to demonstrate a reasonable need for the extension.

The court retains the discretion to balance whether, under the risky and time-sensitive circumstances of a complex takeover bid, the enforcement agencies "reasonably require" an additional 25 days. Accordingly, the sole consideration of the court must not be the burden or workload of the agencies. Thus, factors such as the number of documents to be reviewed must not be weighed independent of the time sensitivity of a proposed merger. Moreover, other factors, such as the scope of the merger or the number, size or complexity of the markets involved in the transaction or the extensiveness of the agency's investigation must not be considered solely from the agency's perspective, but also from the perspective of the success of the proposed action. A larger, more complex transaction may also be more time-sensitive. In sum, the court must balance the agency's need for more time against the need for expeditious consummation of important takeover bids.

To provide the court with the appropriate discretion to balance these concerns, the Metzenbaum amendment was altered to only grant the additional time when reasonably required by the enforcing agency.

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100TH CONGRESS *1st Session* | SENATE | REPORT 100-119

AMENDING TITLE 11, UNITED STATES CODE, THE BANKRUPTCY CODE, REGARDING BENEFITS OF CERTAIN RETIRED EMPLOYEES

JULY 21 (legislative day, JUNE 23), 1987.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 548]

The Committee on the Judiciary, to which was referred the bill (S. 548) to amend title 11, United States Code, the Bankruptcy Code, regarding benefits of certain retired employees, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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I. PURPOSE OF BILL

Title I of S. 548 amends the Bankruptcy Code to provide additional protections for the insurance benefits of retirees, their spouses and dependents, of debtors under the Bankruptcy Code.

The purpose of Title II is to make certain Bankruptcy Code amendments relative to family farmers applicable to cases commenced before November 26, 1986, that are either pending or reviewable.

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The purpose of Title III is to make nondischargeable any debt arising from a judgment or consent decree requiring an individual debtor to make restitution as a result of a violation of State law.

II. History of Legislation

The bill, as amended, addresses situations with respect to retiree insurance benefits, such as occurred last year when LTV Corporation, after filing a Chapter 11 Bankruptcy petition, immediately terminated the health and life insurance benefits of approximately 78,000 retirees. Among those retirees were persons who received their insurance benefits pursuant to collective bargaining agreements, and those who received those benefits pursuant to non-collectively bargained plans. The LTV action prompted a congressional examination of how the Bankruptcy Code affected the obligations of a reorganizing company to provide insurance benefits to its retirees.

This bill recognizes the conflict between the interests of all other unsecured creditors in a Chapter 11 proceeding and the special problems associated with the cut-off of health and insurance benefits to retirees. The special treatment accorded retiree benefit payments is appropriate because of the hardship imposed on elderly recipients when such benefits are suddenly curtailed. However, this bill addresses the needs of retirees within context of the traditional structure of the Bankruptcy Code. The broader issues associated with retiree benefits remain to be addressed by other committees of appropriate jurisdiction.

On July 28, 1986, the Senate Judiciary Committee conducted a hearing in Cleveland, Ohio on the action taken by LTV. On July 30, the Senate passed S. 2690, a bill ordering LTV to reinstate the benefits. That same day, LTV requested and received a bankruptcy court order temporarily restoring the benefits. On August 7, 1986, the House Judiciary Committee's Subcommittee on Monopolies and Commercial Law held hearings on H.R. 5283, a measure requiring LTV to continue to pay all retiree medical and life insurance benefits.

On September 29, the House passed H.R. 5490, entitled "A Bill to amend Title 11 of the United States Code to clarify the current meaning of section 1113 relating to the rejection of collective bargaining agreements by debtors in bankruptcy."

On October 3, the Senate adopted a Metzenbaum, Thurmond, Heinz amendment (S. Amend. 3192) to the Continuing Resolution (H.J. Res. 738) requiring companies in Chapter 11 to continue to pay all medical and life insurance benefits to retirees until May 15, 1987. The provision was enacted as part of P.L. 99-591. This was intended as a stopgap measure to enable Congress to develop appropriate legislation.

A similar provision was added to the Declaration of Taking Act (Public Law 99-656) and as a substitute for H.R. 5490.

During debate on S. Amend. 3211, Senators Metzenbaum and Thurmond emphasized that it was not intended, nor should it be construed, to affect the interpretation of section 1113 of the Bankruptcy Code.

On April, 2, 1987, Senator Metzenbaum, together with 15 cosponsors, introduced S. 903 to extend th stongap measure through September 15, 1987. The bill was reported by the Judiciary Committee, with amendment, on April 9, and was passed by the Senate on April 15. S. 903 was discharged from the House Judiciary Committee and passed by the House on April 30. It was signed into law on May 15, 1987 (Public Law 100-41). On February 19, 1987, Senators Metzenbaum, Heinz and 10 other Senators introduced S. 548. Subsequently nine Senators were added as additional cosponsors. The bill was referred to the Committee on the Judiciary and subsequently referred to the Subcommittee on Courts and Administrative Practice.

The Subcommittee on Courts conducted hearings on S. 548 on April 1 and April 24. Several witnesses testified in support of the legislation, including: the American Association of Retired Persons; Blue Cross/Blue Shield; Hubert H. Humphrey III, Attorney General of the State of Minnesota; National Council of Senior Citizens; United Steel Workers of America; United Auto Workers; and the United Mine Workers of America.

Other witnesses, including the American Bar Association, Corporate Banking and Business Law Section, National Bankruptcy Conference, and several experienced bankruptcy practitioners, raised serious concerns or objections regarding, among other things, the impact of this legislation on the equitable treatment of all creditors and the appropriateness of relying on the Bankruptcy Code to provide protection for retirees of financially troubled companies.

On May 27, 1987, after defeating a Thurmond substitute by a vote of 3-2, the Subcommittee amended the bill and reported it favorably by a vote of 4-1. The Subcommittee adopted a Metzenbaum substitute for the text of S. 548 by a 4-1 vote. A Grassley amendment regarding restitution payments and a Thurmond amendment regarding farm bankruptcy were accepted by voice vote. On June 23 the full Committee adopted a Metzenbaum substitute for the retiree benefits provisions, a Thurmond amendment, and the bill, as amended, was reported favorably by voice vote.

III. Discussion

Title I—Retiree Insurance Benefits Security Act of 1987

I. SECTION 1114

Chapter 11 of the Bankruptcy Code is amended by enacting a new Section 1114 entitled "Payment of Insurance Benefits to Retired Employees," in order to provide specific protections under the Bankruptcy Code for certain insurance benefits of retired employees, their spouses and dependents. These benefits are defined by the bill as medical, surgical or hospital care benefits payable in the event of sickness, accident, death or disability (hereinafter referred to as "retiree benefits").

A. The bill requires that such benefits, provided to retired employees, their spouses and dependents pursuant to a plan in effect at the time of a Chapter 11 proceeding is commenced, will continue to be paid when the employer providing those benefits files or has filed against it a petition under Chapter 11 of the Bankruptcy

Code, until or unless a modification is agreed to by the parties or ordered by the court.

This bill is not intended to affect current law treatment of pension benefits in Chapter 11 proceedings.

In addressing the modification of retiree benefits arising under a collective bargaining agreement, the Committee makes no judgment as to whether trustees may seek modification of such retiree benefits under Section 1114 without first complying with the provisions of Section 1113 of the Bankruptcy Code.

The Committee recognizes that some debtors may provide retiree benefits by contributing in accordance with a collective bargaining agreement to multiemployer health, welfare, and pension plans. These plans are trust funds established and maintained by more than one employer pursuant to one or more collective bargaining agreements. Pursuant to Federal employee benefits and labor laws, these plans are separate legal entities and are administered by labor-management boards of trustees for the exclusive benefit of the plan participants and benficiaries. They are generally financed solely by employer contributions, and a loss of such contributions from any one employer detracts from a plan's ability to pay benefits to the participants and beneficiaries of the plan as a whole.

Retiree benefits include contributions or other required payments to multiemployer plans for the purposes described in the bill. Therefore, the requirements of S. 548 apply to these benefits arrangements. However, the plan provisions continue to govern the eligibility of retired employees and their spouses and dependents for payments or other benefits from the multiemployer plans. No provisions in a multiemployer plan, including those regarding benefit eligibility, can be modified by court order or by agreement between an authorized representative and a trustee.

B. When a trustee attempts to modify retire benefits or when the court otherwise finds it appropriate, the bill provides for the appointment of an "authorized representative." Labor organizations which have signed a collective bargaining agreement covering retiree benefits will serve as the authorized representative of retiree benefit recipients in Chapter 11 proceedings unless the labor organization elects not to serve in such capacity or the court determines that separate representation is appropriate. For nonunion retirees the court shall appoint a committee of such retirees to serve as the authorized representative.

In determining whether a representative other than the union is appropriate, the court may consider whether a conflict prevents the labor organization from effectively representing the interests of the union retirees.[1] Separate representation is not necessarily appropriate merely because retirees outnumber active employees.

C. Section 1114(b)(2) provides that committees of retirees appointed under Section 1114 will have the same rights, powers and duties as other committees for the purposes of Sections 1114 and 1129(a)(12). This empowers the Committee, for example, to retain professionals at the expense of the estate. The Committee shall

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[1] For discussion of the types of conflicts that may arise see *In Re Century Brass Products, Inc.*, 795 F. 2d.265 (2d Cir. 1986).

have the right to represent retirees in valuing the retiree benefit claims.

It is not intended that a labor organization which elects not to serve as the authorized representative of retirees pursuant to subsection (c)(1)(A) shall be compensated for professional services by the estate. In addition, the court may permit a committee to protect the rights of retirees for purposes of other sections of Title 11 as they relate to retiree benefits. The Committee intends for the court to ensure that a committee appointed under Section 1114 has the ability to protect retiree benefits to the same extent that retiree benefits for union retirees may be protected.

It is the intention that the committees appointed under Section 1114 not replace the role of the unsecured creditors committee in protecting the claims and interests of retirees.

D. The bill provides that payments of retiree benefits shall not be modified by a debtor except by agreement with the authorized representative or upon order of the court, after a finding that the modifications sought are necessary to permit the reorganization of the debtor, are clearly favored by a balance of the equities and assure that all affected parties are treated fairly and equitably.

Section 1114 makes it clear that when a Chapter 11 petition is filed retiree benefit payments must be continued without change until and unless a modification is agreed to by the parties or ordered by the court. Section 1114(e)(1) rejects any other basis for trustees to cease or modify retiree benefit payments.

Section 1114(e)(2) provides that all retiree benefit payments shall have the status of allowed administrative expenses under Section 503 of Title 11.

Section 1114(k)(3) supplements the trustee's obligation under subsection (f)(1)(B) to provide the authorized representative with relevant information for evaluating proposed modifications in the payment of retiree benefits. The subsection permits a court to enter protective orders as may be necessary to prevent disclosure of the information where it would subject the debtor to a competitive disadvantage. Any protective order should take into account the need of the authorized representative to evaluate the trustee's proposal and application for modification.

If the good faith bargaining between the trustee and the retirees' authorized representative produces no agreement, Section 1114(g) provides that the trustee may seek court-approved modifications of retiree benefit payments. Section 1114(k)(1) requires a court to commence a hearing on an application for modification of retiree benefit payments within 14 days of the filing of the application. All interested parties may appear and be heard at the hearing, for which adequate notice must be provided to all interested parties at least 10 days before the hearing date. With respect to the 14-day requirement, the trustee and authorized representative may agree to additional periods of time and the court may, in any event, extend the 14-day period by as much as 7 days where the circumstances of the case and the interests of justice so require.

Section 1114(g) also provides that a court shall enter an order permitting a modification in retiree benefit payments, if it finds, after notice and a hearing that: (1) the trustee, prior to the hearing, made a proposal meeting the three requirements of subsection

(f); (2) the retirees' authorized representative refused to accept the proposal without good cause; and (3) such modification is necessary to permit the reorganization of the debtor and assures that creditors, the debtor, and all of the affected parties are treated fairly and equitably, and the modification is clearly favored by the balance of the equities.

These standards are intended to be identical to those contained in Section 1113. In adopting this standard the Committee believes that it is important to use a standard with which the courts are already familiar. The Committee believes that the Section 1113 standards strike a fair and reasonable balance between the need to protect the rights of retirees and the rights of other creditors.

Subsection (k)(2) requires the court to rule within 90 days after the hearing begins unless an extension is agreed to by the parties. If the court does not rule within 90 days, or the agreed deadline, the trustee may adopt the proposed modifications pending a court ruling.

Subsection (g) prohibits the court from modifying the retiree benefit payments to a level lower than that proposed by the trustee in the proposal found by the court to have met the requirements of subsection (f).

The Committee intends to make clear that the modification process under Section 1114 need not be a one-time occurrence. The financial circumstances of the debtor may warrant subsequent modifications.

The first proviso subsection (g) enables retirees to petition the court to seek increased retiree benefit payments if such payments have previously been modified. The court shall order an increase if the standards set forth in Section 1114(g) are met.

The second proviso of subsection (g) makes clear that both the trustee and the authorized representative may make more than one application to modify retiree benefit payments. Thus, the trustee can seek more than one reduction in the level of retiree benefits through the process set forth in Section 1114, and the authorized representative can seek more than one increase in the level of retiree benefits consistent with the first proviso. The modifications may be sought at any time prior to confirmation of a reorganization plan. Section 1114 does not authorize the court to order an increase in retiree benefit payments above the level being paid on the date that the Chapter 11 petition is filed.

E. Section 1114(h) provides for emergency interim modifications in retiree benefits if essential to the continuation of the debtor's business or to avoid irreparable damage to the estate.

F. Section 1114(i) provides that retiree benefits actually paid before confirmation of a plan under Chapter 11 shall not be offset from claims for benefits that remain unpaid, whether such claims are for benefits not paid as a result of benefit payment modifications under Section 1114 or arise from a right to future unpaid benefits.[2]

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[2] The calculation contemplated by Section 1114(i) may be illustrated as follows: If the present value of the health insurance benefits of retirees is $100 million at the time the petition is filed and the court orders a modification reducing benefit payments by $25 million, the retirees have

Continued

G. Section 1114(j) provides that claims for retiree benefits shall not be limited by 11 U.S.C. 502(b)(7) with respect to the termination of an employment contract.

By dealing with the effects of Section 502(b)(7) on retiree benefits only, the Committee makes no comment on the applicability of Section 502(b)(7) to claims for other noncollectively or collectively bargained benefits.

H. Section 1114(l) excludes from the provisions of Section 1114 any retiree, dependent or spouse when the retiree's gross income, for the 12 months preceding the filing of the petition under Chapter 11, equals or exceeds $1 million, provided the retiree can obtain comparable insurance coverage. The Committee recognizes that the special treatment of retiree benefits created by Section 1114 may impact negatively on other unsecured creditors. Therefore, the Committee feels that retirees who have high incomes should not benefit from this special status to the detriment of other unsecured creditors. However, any such excluded retiree will retain his or her status as an unsecured creditor.

II. PLAN CONFIRMATION

The bill provides that a plan for reorganization may not be confirmed under Chapter 11 of the Bankruptcy Code unless the plan provides for continuation of retiree benefits after confirmation for the duration of the employer's obligation to provide those benefits, at a level set by the court pursuant to Section 1114 or agreed to between the trustee and the retirees' authorized representative. The retirees will also have an unsecured claim, payable in accordance with the provisions of the Bankruptcy Code and the reorganization plan, for those retiree benefit payments which have been lost as a result of Section 1114 modifications.

III. EFFECTIVE DATE

This bill is effective for cases filed under Chapter 11 on or after the date of enactment and to all cases filed under Chapter 11 where a plan of reorganization has not been confirmed as of June 23, 1987 and where any retiree benefit was still being paid on or after October 2, 1986.

Title II—Farm bankruptcy

This title addresses the issue of the application of the Family Farmer Reorganization Act, P.L. 99-554 ("Chapter 12") to bankruptcy cases that were pending in other chapters at the time of enactment.

The Conference Committee on the 1986 amendments creating Chapter 12 clearly intended that conversion of pending cases be allowed on a case-by-case basis. This intent is best expressed in the Conference Committee Joint Explanatory Statement:

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an unsecured claim for the full $25 million. If every unsecured claimant receives 50 cents on every dollar, retirees would receive $12.5 million in addition to the continuation of 75 percent of their original health benefit. The Committee intends for this subsection to prohibit a court from calculating the unsecured claim as follows: (1) start with a $100 million claim; (2) all unsecured creditors receive 50 cents on every dollar, leaving $50 million in claims; (3) because $75 million is being paid, the retirees have no claim beyond the continuation of 75 percent of the benefit.

> It is not intended that there be routine conversion of Chapter 11 and 13 cases, pending at the time of enactment, to Chapter 12. Instead, it is expected that courts will exercise their sound discretion in each case, in allowing conversions only where it is equitable to do so.
>
> Chief among the factors the court should consider is whether there is a substantial likelihood of successful reorganization under Chapter 12.
>
> Courts should also carefully scrutinize the actions already taken in pending cases in deciding whether, in their equitable discretion, to allow conversion. For example, the court may consider whether the petition was recently filed in another chapter with no further action taken. Such a case may warrant conversion to the new chapter. On the other hand, there may be cases where a reorganization plan already has been filed or confirmed. In cases where the parties have substantially relied on current law, availability to convert to the new chapter should be limited.

However, certain statutory language found in Section 302(c) of Public Law 99-554 is inconsistent with this intent. As a result, courts have ruled inconsistently on the issue of conversion of pending cases. A majority of courts have denied motions to convert pending cases. *In re Tomlin Farms, Inc.,* 68 BR 41 (Bankr. D. N.D. 1986); *In re Albertson,* 68 BR 1017 (Bankr. W.D. Mo. January 14, 1987); *In re Spears,* 69 BR 511 (Bankr. W.D. Ia. January 26, 1987). But see, *In re Erickson Partnership,* 68 BR 819 (Bankr. D. S.D. January 8, 1987); *In re Big Dry Angus Ranch,* 69 BR 695 (Bankr. D. Mont. February 5, 1987).

This inconsistent treatment has caused substantial hardship to otherwise eligible Chapter 12 debtors, some of whom filed bankruptcy petitions a matter of days before the effective date of November 26, 1986. See, *In re Groth,* 69 BR 90 (Bankr. D. Minn. January 13, 1987) (Debtor denied ability to convert Chapter 13 case filed on November 21, 1986).

In addition to the factors already named by the Committee as relevant to the decision on motions to convert cases to Chapter 12, the Committee believes bankruptcy courts should consider the debtor's demonstrable managerial skills, and the high probability that the debtor will be able to service the debt retained under the proposed plan.

Title III—Restitution

In 1986, the Supreme Court held that 11 U.S.C. 523(a)(7) preserves from discharge in Chapter 7 any condition—including restitution—a state criminal court imposes as part of a criminal sentence. *Kelly* v. *Robinson,* —— U.S. ——, 107 S. Ct. 353 (1986). This title codifies *Kelly* and is addressed to the current ability of debtors to discharge civil restitution orders in bankruptcy.

The implications of current law for state law enforcement efforts in the consumer protection and environmental protection areas are particularly significant. For example, consumer protection attorneys litigating unfair and deceptive trade practices cases have had to do battle on two fronts in order to obtain restitution for victims

of consumer fraud. First, there is litigation in State court under the consumer protection statutes. Second, after judgment or default, defendants frequently seek haven in bankruptcy court, to avoid repayment of ill-gotten gains.

Many of these defendants succeed because the Code does not expressly designate consumer fraud or any other type of civil restitution orders as nondischargeable. Instead, the Code only provides that debts "for money . . . obtained by false pretenses, a false representation or actual fraud . . ." may be declared nondischargeable after the filing of a complaint and a hearing. Courts have interpreted this exception to require proof of common law fraud, usually not an element of State consumer protection statutes. Law enforcement authorities are thus placed in the position of having to relitigate cases in bankruptcy court, proving all the elements of common law fraud, or allow the discharge.

Allowing consumer fraud defendants to relitigate their fraud in bankruptcy court has sent a clear message nationwide. The message has been that these defendants should defend (or preferably default) in State court and let the bankruptcy court decide the fraud issue anew. After a sufficient delay, the State may lack the resources necessary to pursue a dischargeability complaint.

There is more to this "loophole" in our law enforcement. At least one U.S. Court of Appeals has held that the State Attorney General lacked standing to challenge the dischargeability of a consumer protection restitution order he has obtained. Thus, the individual victims were left to proceed alone with their separate dischargeability complaints.

Although the bankruptcy code specifically excludes back taxes, government guaranteed student loans, and alimony from discharge, no such exception prevents the discharge of civil restitution orders.

Accordingly, this title is very straightforward. It makes nondischargeable any debt arising from a judgment or consent decree requiring a debtor to make restitution as a result of a violation of law. A conforming amendment incorporates this change to cases filed under Chapter 13 of Title 11.

IV. Text of S. 548 as Amended

[S. 548, 100th Cong., 1st Sess.]

A BILL To amend title 11, United States Code, the Bankruptcy Code, regarding benefits of certain retired employees

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—RETIREE INSURANCE

Sec. 101. (a) Subchapter I of chapter 11 of title 11, United States Code, is amended by adding at the end thereof the following new section:

"§ 1114. Payment of insurance benefits to retired employees

"(a) For purposes of this section, the term 'retiree benefits' means payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their

spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

"(b)(1) For purposes of this section, the term 'authorized representative' means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.

"(2) Committees of retired employees appointed by the court pursuant to this section shall have the same rights, powers, and duties as committees appointed under sections 1102 and 1103 of this title for the purpose of carrying out the purposes of sections 1114 and 1129(a)(12) and, as permitted by the court, shall have the power to enforce the rights of persons under this title as they relate to retiree benefits.

"(c)(1) A labor organization shall be, for purposes of this section, the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing, determines that different representation of such persons is appropriate.

"(2) In cases where the labor organization referred to in subparagraph (1) elects not to serve as the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, or in cases where the court, pursuant to subparagraph (1) finds different representation of such persons appropriate, the court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, from among such persons, to serve as the authorized representative of such persons under this section.

"(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement.

"(e)(1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section 'trustee' shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that—

"(A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modifica-

tion of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or

"(B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments,

after which such benefits as modified shall continue to be paid by the trustee.

"(2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.

"(f)(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall—

"(A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

"(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

"(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.

"(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—

"(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

"(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

"(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities,

except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f): *Provided, however,* That at any time after an order is entered providing for modification in the payment of retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree benefits sought is consistent with the standard set forth in paragraph (3); and: *Provided further,* That neither the trustee nor the authorized repre-

sentative is precluded from making more than one motion for a modification order governed by this subsection.

"(h)(1) Prior to a court issuing a final order under subsection (g) of this section, if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim modifications in retiree benefits.

"(2) Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee.

"(3) The implementation of such interim changes does not render the motion for modification moot.

"(i) No retiree benefits paid between the filing of the petition and the time of a plan confirmed under section 1129 of this title becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section.

"(j) No claim for retiree benefits shall be limited by section 502(b)(7) of this title.

"(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.

"(2) The court shall rule on such application for modification within 90 days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the authorized representative may agree to. If the court does not rule on such application within 90 days after the date of the commencement of the hearing, or within such additional time as the trustee and the authorized representative may agree to, the trustee may implement the proposed modifications pending the ruling of the court on such application.

"(3) The court may enter such protective orders, consistent with the need of the authorized representative of the retirees to evaluate the trustee's proposal and the application for modification, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

"(l) This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the 12 months preceding the filing of the bankruptcy petition equals or exceeds $1,000,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical,

life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition under this title.".

(b) Section 1129 of title 11, United States Code, is amended by adding at the end of subsection (a) thereof the following:

"(12) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.".

(c) The table of sections for subchapter I of chapter 11, title 11, United States Code, is amended by adding at the end thereof the following new item:

"1114. Payment of insurance benefits to retired employees ".

(d) This title and the amendments made by this title shall become effective on the date of enactment of this Act and shall be effective with respect to cases commenced under chapter 11 of title 11, United States Code, in which a plan for reorganization was not confirmed by the court as of June 23, 1987, and in which any retiree benefit, as defined in section 1114 of title 11, United States Code, was still being paid on October 2, 1986 or thereafter, and in cases that become subject to chapter 11, title 11, United States Code, after October 2, 1986.

TITLE II—EXPANDED APPLICATION OF CERTAIN BANKRUPTCY AMENDMENTS RELATING TO FAMILY FARMERS

SEC. 201. (a) Section 302(c) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (Public Law 99-554) is amended—

(1) by repealing paragraph (1), and

(2) by redesignating paragraphs (2), and (3) as paragraphs (1) and (2), respectively.

(b) The amendments made by subtitle B of title II of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (Public Law 99-554) shall apply to—

(1) cases that are pending under title 11 of the United States Code, or

(2) cases under title 11 of the United States Code that are reviewable on appeal,

after the date of the enactment of this Act, without regard to whether such cases were commenced before November 26, 1986.

TITLE III—NONDISCHARGEABILITY OF CERTAIN DEBTS FOR RESTITUTION

SEC. 301. Section 523(a) of title 11, United States Code, is amended—

(1) in paragraph (9), by striking out "or" at the end thereof;

(2) by redesignating paragraph (10) as paragraph (11); and

(3) by inserting after such paragraph (9) the following:

"(10) to the extent that such debt arises from a violation by the debtor of a civil or criminal law enforceable by an action by a government unit to recover restitution, damages, civil penalties, attorney fees, costs or any other relief, or to the extent that such debt arises from an agreed judgment or other agreement by the debtor to pay money or transfer property in settlement of such an action by a governmental unit; or".

SEC. 302. Section 1328(a)(2) of title 11, United States Code, is amended by striking out "section 523(a)(5)" and inserting in lieu thereof "paragraphs (5) and (10) of section 523(a)".

SEC. 303. The amendments made by this title shall apply to cases that become subject to title 11, United States Code, after June 23, 1987.

Amend the title so as to read as: "A bill entitled 'To amend title 11, United States Code, the Bankruptcy Code, regarding benefits of certain retired employees and for other purposes' ".

V. SECTION-BY-SECTION ANALYSIS

Title I: Retiree insurance benefits

Section 101(a) of the bill adds new Section 1114 to the Bankruptcy Code covering retiree insurance benefits.

Subsection 1114(a) defines "retiree benefits".

Subsections 1114 (b), (c) (d) provide for the representation of retirees. The labor organization represents union retirees unless it elects not to, or if a court after notice and hearing, finds that different representation is appropriate. For nonunion retirees, and for those cases where the union does not represent its retirees, the court shall appoint a committee of retirees. Subsection (b)(2) defines the rights, powers and duties of this committee.

Subsection 1114(e) requires the trustee to continue to pay retiree benefits unless a modification is ordered by the court or unless a modified level of benefits is agreed to by the trustee and the authorized representative. Any required payment is treated as an administrative expense; any benefits lost due to modification remain unsecured claims.

Subsections 1114 (f) and (k) provide that before requesting a court modification of retiree benefits the trustee must make a proposal to the retirees. Such proposal must provide for those modifications necessary to permit reorganization and assure that all parties are treated fairly and equitably. The trustee must provide relevant information to evaluate the proposal, except that the court may issue necessary protective orders to protect confidential business information. The trustee must meet and negotiate with the retirees in good faith.

Subsection 1114(g) provides that the trustee make a proposal that fulfills the requirements of subsection (f) and the retirees reject it without good cause, the trustee may petition the court for a modification. The court must schedule a hearing within 14 days unless an extension is agreed to by the parties. If the court does not rule within 90 days, or a longer period agreed to by the parties, the trustee may adopt the proposed modifications on an interim basis. The court shall order a modification if the court finds such modification necessary to permit reorganization, is fair to all parties, and

is clearly favored by the balance of the equities. The court cannot order a level of retiree benefit payments lower than the trustee's offer. The trustee or the retirees may petition the court for a subsequent change in the level of benefits payments.

Subsection 1114(h) allows a trustee to obtain an interim modification to prevent irreparable damage prior to the court's issuance of an order providing for modifications under subsection (f).

Subsection 1114(i) provides that retirees will have an unsecured claim for the full amount of any unpaid benefits.

Subsection 1114(j) provides that 11 U.S.C. 502(b)(7), limiting employment contract termination claims to 1 year's damages, does not limit retiree benefit claims.

Subsection 1114(l) excludes from Section 1114 any retiree whose gross income was one million dollars or more for the 12 months period immediately preceding the filing of the Chapter 11 petition, unless the retiree can show he or she is unable to obtain comparable insurance coverage.

Section 101(b) of the bill amends 11 U.S.C. 1129(a) to require that the plan of confirmation provide for a continuation of the retiree benefits at the level established pursuant to Section 1114.

Section 101(c) of the bill amends the table of sections of title 11 U.S.C.

Section 101(d) of the bill provides the effective date of this section. The bill applies to companies which were paying retiree benefits on or after October 2, 1986, and where a plan of confirmation was not confirmed as of June 23, 1987.

Title II: Farm Bankruptcy

This title expands the application of certain amendments to the Bankruptcy Code relating to family farmers.

Title III: Restitution

This title makes any debt arising from a judgement or consent decree requiring an individual debtor to make restitution as a result of a violation of state law nondischargeable in bankruptcy.

VI. Estimated Cost of Legislation

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and Section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, July 10, 1987.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 548, the Retiree Insurance Benefits Security Act of 1987, as ordered reported by the Senate Committee on the Judiciary, June 23, 1987.

Based on information provided by the Department of Justice and the Administrative Officer of the U.S. Courts, CBO expects that enacting this bill would not significantly affect the workloads of the bankruptcy courts and trustees, and therefore would not result in increased costs to the federal government.

S. 548 would add a new section to the bankruptcy code a establish procedures for modifying or terminating retiree health and life insurance benefits when companies declare bankruptcy.

S. 548 would also amend Chapter 12 of the bankruptcy code, known as the Family Farmers Bankruptcy Act, which was enacted in November 1986. This bill would clarify the language allowing cases that were pending or reviewable on appeal at the time Chapter 12 was enacted to convert to Chapter 12, which provides more protection to debtors. As a result, enactment of S. 548 could affect federal outlays if the filings involve loans issued by the Farmers Home Administration. Based on information provided by the Departments of Agriculture and Justice, however, we expect that enacting this bill would not significantly affect federal outlays, because most of these cases have already converted to Chapter 12, or have already been settled.

Enactment of this bill would not affect the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

EDWARD M. GRAMLICH, *Acting Director.*

VII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), Rule XXVI of the standing rules of the Senate, the Committee, after due consideration, concludes that the act will not have any direct regulatory impact.

VIII. CHANGES IN EXISTING LAW

In compliance with paragraph (12) of rule XXVI of the Standing rules of the Senate, changes in existing law made by S. 548 are as follows: Existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman.

UNITED STATES CODE

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TITLE 11—BANKRUPTCY

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CHAPTER 11—REORGANIZATION

SUBCHAPTER I

* * * * * * *

Sec. 1114. Payment of insurance benefits to retired employees.

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§ 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

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(9) to any entity, to the extent that such debt arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or its territories wherein such motor vehicle was operated and within which such liability was incurred; **[**or**]**

(10) to the extent that such debt arises from a violation by the debtor of a civil or criminal law enforceable by an action by a governmental unit to recover restitution, damages, civil penalties, attorney fees, costs or any other relief, or to the extent that such debt arises from an agreed judgment or other agreement by the debtor to pay money or transfer property in settlement of such an action by a governmental unit; or.

[(10)**]** *(11)* that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a) (2), (3), (4), (5), (6), or (7) of this title, or under section 14c (1), (2), (3), (4), (6), or (7) of such Act.

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SECTION 1113 (11 U.S.C. § 1113)

§ 1113. Rejection of collective bargaining agreements.

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

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(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

§ 1114. Payment of insurance benefits to retired employees

(a) For purposes of this section, the term "retiree benefits" means payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

(b)(1) For purposes of this section, the term "authorized representative" means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.

(2) Committees of retired employees appointed by the court pursuant to this section shall have the same rights, powers, and duties as committees appointed under sections 1102 and 1103 of this title for the purpose of carrying out the purposes of sections 1114 and 1129(a)(12) and, as permitted by the court, shall have the power to enforce the rights of persons under this title as they relate to retiree benefits.

(c)(1) A labor organization shall be, for purposes of this section, the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing, determines that different representation of such persons is appropriate.

(2) In cases where the labor organization referred to in subparagraph (1) elects not to serve as the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, or in cases where the court, pursuant to subparagraph (1) finds different representation of such persons appropriate, the court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, from among such persons, to serve as the authorized representative of such persons under this section.

(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement.

(e)(1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section "trustee" shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that—

(A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of

such payments, pursuant to the provisions of subsections (g) and (h) of this section, or

(B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments,

after which such benefits as modified shall continue to be paid by the trustee.

(2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.

(f)(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall—

(A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.

(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities,

except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f); provided, however, that at any time after an order is entered providing for modification in the payment of retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree benefits sought is consistent with the standard set forth in paragraph (3); and, provided further, that neither the trustee nor the authorized representative is precluded from making more than one motion for a modification order governed by this subsection.

(h)(1) Prior to a court issuing a final order under subsection (g) of this section, if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim modifications in retiree benefits.

(2) Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee.

(3) The implementation of such interim changes does not render the motion for modification moot.

(i) No retiree benefits paid between the filing of the petition and the time of a plan confirmed under section 1129 of this title becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section.

(j) No claim for retiree benefits shall be limited by section 502(b)(7) of this title.

(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.

(2) The court shall rule on such application for modification within 90 days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the authorized representative may agree to. If the court does not rule on such application within 90 days after the date of the commencement of the hearing, or within such additional time as the trustee and the authorized representative may agree to, the trustee may implement the proposed modifications pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the retirees to evaluate the trustee's proposal and the application for modification, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(l) This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the 12 months proceding the filing of the bankruptcy petition equals or exceeds $1,000,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan,

comparable to the coverage provided by the employer on the day before the filing of a petition under this title.

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§ 1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

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(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

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§ 1328. Discharge.

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1322(b)(5) of this title; or

(2) of the kind specified in **[**section 523(a)(5)**]** *paragraphs (5) and (10 of section 523(a)* of this title.

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SEC. 302. EFFECTIVE DATES; APPLICATION OF AMENDMENTS.

(a) GENERAL EFFECTIVE DATE.—Except as provided in subsections (b), (c), (d), (e), and (f), this Act and the amendments made by this Act shall take effect 30 days after the date of the enactment of this Act.

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(b) AMENDMENTS RELATING TO BANKRUPTCY JUDGES AND INCUMBENT UNITED STATES TRUSTEES.—Subtitle A of title I, and sections 301 and 307(a), shall take effect on the date of the enactment of this Act.

(c) AMENDMENTS RELATING TO FAMILY FARMERS.—[(1) The amendments made by subtitle B of title II shall not apply with respect to cases commenced under title 11 of the United States Code before the effective date of this Act.]

[(2)] *(1)* Section 1202 of title 11 of the United States Code (as added by the amendment made by section 255 of this Act) shall take effect on the effective date of this Act and before the amendment made by section 227 of this Act.

[(3)] *(2)* Until the amendments made by subtitle A of title II of this Act become effective in a district and apply to a case, for purposes of such case—

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IX. VOTE OF THE COMMITTEE

On June 23, 1987, with a quorum present, by voice vote, the Committee on the Judiciary ordered S. 548 as amended favorably reported.

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